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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 572

JESSE JAMES ARNOLD and GEORGE DIXON

vs.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

BRIEF OF PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE SUPREME COURT
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Opinion Below

The Supreme Court of North Carolina filed written opinion in this cause on the 1st day of February, 1963. The said opinion is reported in the following publications: 258 N.C. 563; 129 S.E. 2nd 229. This opinion of the Supreme Court of North Carolina is reproduced in the printed record before this court, pages 54 through 69. The judgment of the Supreme Court of North Carolina entered on the 1st day of February, 1963, affirmed the judgment of the Superior Court of Lenoir County. The judgment of the Superior Court of Lenoir County was entered during the December, 1961, Special Term and is reproduced on pages 41, 42 and 43, of the printed record before this court.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on the 1st day of February, 1963 (R. p. 54). Petitioners' notice of appeal from the decision of the Supreme Court of North Carolina was filed in this court on the 13th day of May, 1963, in the form of a petition for a writ of certiorari. After the filing of petitioners' statement as to jurisdiction, petition for leave to proceed *in forma pauperis* and petition for certiorari, this Court entered an order granting the petitioners' motion for leave to proceed *in forma pauperis*, and certiorari was granted on October 10, 1963. The jurisdiction of this Court rests upon Title 28, U.S.C.A. Sec. 1257 (3), and Sec. 2101 (d), and under the revised rules of this Court, Rule 22 (1), this being an appeal from the Supreme Court of the State of North Carolina in an action where is drawn in question the proposition that the constitutional rights guaranteed a citizen of the United States may have been violated or denied said citizen by the actions of the State Court.

The defendants below were tried upon a bill of indictment charging first degree murder (R. p. 3), and they were convicted of said offense and sentenced to death (R. pp. 41, 42 and 43). Their appeal in this Court is based upon a denial of due process as contemplated under the 14th Amendment to the United States Constitution in that members of their race, to wit: Negroes, were systematically excluded from the grand jury which returned the bill of indictment against them, because of their race, and upon the further grounds that the State of North Carolina denied them due process when it brought them to trial without a mental examination as required by the order signed in this cause by Albert W. Cowper, Judge (R. pp. 5 and 6).

State Constitutional and Statutory Provisions Involved

a. *Section 17, Article I, Constitution of North Carolina:* No Person taken, etc., but by law of land. No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land.

b. *G.S. 9-1. Jury list from taxpayers of good character:* The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year, 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of the names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names

of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be *non compos mentis*.

c. *G.S. 9-2. Names on list put in box:* The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

d. *G.S. 9-3. Manner of drawing panel for term from box:* At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said

commissioners, may, at the same time, and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

e. *G.S. 9-24. How Grand Jury drawn:* The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

f. *G.S. 9-25. Grand Juries in certain counties:* At the first fall and spring terms of the criminal courts held for the counties of Columbus, Craven, Cumberland, Durham, Gaston, Guilford, Iredell, Johnston, Lenoir, McDowell, Mecklenburg, Moore, Nash, New Hanover, Pitt, Richmond, Vance, Wake and Wayne, Grand Juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring term, respectively. In the event of vacancies occurring in the Grand Jury of Pitt or McDowell county, the judge holding the court of said county may, in his discretion, order a new juror drawn to take the oaths prescribed and to fill any vacancy occurring thereon.

At any time the judge of the superior court presiding over either the criminal or civil court of Cumberland, Durham, Lenoir, McDowell and New Hanover counties may call

said Grand Jury to assemble and may deliver unto said Grand Jury an additional charge. The said judge presiding over either the criminal or civil court of Cumberland, Durham, Lenoir, McDowell or New Hanover counties may at any time discharge said Grand Jury from further service, in which event he shall cause a new Grand Jury to be drawn which shall serve during the remainder of the said fall or spring term. The first nine members of the Grand Jury chosen at the first term of the superior court of Cumberland and Lenoir counties for the trial of criminal causes in the year of one thousand nine hundred twenty-two shall serve during the spring and fall terms, and at the first of such courts of the fall and spring terms thereafter, nine additional jurors shall be chosen to serve for one year. . . .

g. *G.S. 122-91. Alleged criminal may be committed for observation:* Any alleged criminal indicted or charged with the commission of a felony may, on the order of the presiding or residing judge of the superior court, in or out of term, be committed to a state hospital for a period of not exceeding sixty days for observation. The order of commitment shall contain the name and address of the nearest responsible relative, if known, and shall also contain the address of the alleged criminal, if known. *If at the end of the observation period* herein provided the alleged criminal is found to be mentally incompetent of pleading to the charge against him, the superintendent of the state hospital concerned shall report his findings and recommendations to the clerk of the superior court of the county from which the alleged criminal was committed. It shall be the duty of such clerk to bring the report to the attention of the presiding or resident judge of the superior court who may, on the basis of the report of the superintendent, commit such alleged criminal in accordance with the provisions of G.S. 122-83. If the alleged criminal shall be found competent, the superintendent of

the state hospital concerned shall report his findings to the clerk of the superior court of the county from which such alleged criminal was committed and the clerk shall notify the sheriff who shall remove the alleged criminal from the state hospital and return him to the county for trial.

Questions Presented

The Court below has held that the defendants failed to carry the burden of proof and establish that members of their race, to wit: Negroes, had been intentionally excluded by reason of their race from service upon the Grand Jury of Lenoir County. The Court below has also held that the defendants were not deprived of due process under the 14th Amendment of the Constitution of the United States by the failure of the State of North Carolina to provide a mental examination in accordance with the orders signed by Judge Albert W. Cowper. The decision of the Supreme Court of North Carolina is now presented for review by this Court under the authority of Title 28 U. S. C. A. 1257(3), and the following questions are presented to this Court.

a. Did the trial court err in denying the defendants' motion to quash the indictment upon the grounds that members of their race, to wit: Negroes, had been systematically kept from service upon the Grand Jury of Lenoir County?

b. Did the trial court err in overruling the motions for a new trial, and for a mental examination by a competent private practicing psychiatrist and psychologist?

Statement

The two defendants were tried in one bill of indictment for the unlawful, wilful, and feloniously premeditated and deliberate murder of George T. McArthur while engaged in the perpetration of the crime of robbery (R. p. 3). The tax abstracts for Lenoir County show that there are 12,250 White abstracts and 4,819 Negro abstracts listed in Lenoir County, making a total of 17,069 abstracts (R. p. 21). The tax abstracts for Lenoir County also show that there are 5,583 White polls listed and 2,499 Negro polls listed, making a total of 8,082 polls listed (R. p. 21).

In the 24 years, preceding the trial of this case, only one Negro has served upon the Grand Jury of Lenoir County; and one other was placed on, but was discovered to be a resident of Pitt County and was excused (R. p. 22). When the case was called for trial, the defendants moved to quash the indictment on the grounds that Negroes had been excluded from the Grand Jury because of their race (R. pp. 18 and 19). The court overruled the motion so made. The defendants, Arnold and Dixon also moved for a continuance on the grounds that they had not been provided with a mental examination in accordance with the order signed by Judge Albert W. Cowper requiring a mental examination of the defendants (R. p. 8 and R. p. 15). That the court overruled the motions so made, and offered to allow the defendants to be examined any time during the trial.

ARGUMENT

I. That the Court Below Erred by Holding That the Defendants Had Failed to Carry the Burden of Establishing Racial Discrimination in the Selection of the Grand Jury of Lenoir County.

Ever since the decision of *Strauder* v. *West Va.*, 100 U.S. 304, it has been held that the exclusion of Negroes from service upon juries, either petit or Grand, solely because of their race deprives defendant Negroes of the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States, and the only real question concerning exclusion presented in this appeal is whether or not the defendants carried the burden of showing a systematic exclusion of Negroes from service upon Grand Juries in Lenoir County. In support of their motion to quash the indictment upon the charge that members of their race had been systematically excluded from service upon the Grand Jury, the defendants called to testify John S. Davis, the Clerk of the Superior Court of Lenoir County, who testified as follows: That he was the Clerk of the Superior Court of Lenoir County and that he has been employed in that capacity for more than 24 years. Mr. Davis testified further that during that time one Negro has served upon the Grand Jury of Lenoir County, and that a second Negro had been placed upon the Grand Jury during that period of time, but that one was excused because he lived in Pitt County (R. pp. 22, 23). That during that same period of time a number of Negroes have served upon the petit juries of Lenoir County. In addition to the testimony of the Clerk, the defendants put on Milton Guy Williams as Tax Supervisor of Lenoir County, who testified as follows: That according to the tax records of Lenoir County, there are 12,250 White abstracts and 4,819 Negro abstracts,

making a total of 17,069 abstracts. That the tax records of Lenoir County also show that there are 5,583 White polls listed, that is White males between the ages of 21 and 49, inclusive, that there are 2,499 Negro polls listed between the ages of 21 and 49, inclusive. The court refused to allow Mr. Williams to testify that Negroes constituted a separate and distinct class of citizens in Lenoir County, however, he did testify that he is required by the laws of North Carolina to keep White and Negro listing separate (R. pp. 21, 22).

To offset this testimony, the State relied upon statements made by John S. Davis, Clerk of the Superior Court upon cross examination to the effect that Negroes had not been systematically excluded from service on either the Grand or Petit jury to his knowledge. The trial court then took over the examination of the witness and under the Court's examination Mr. Davis testified as follows: "A list of jurors are given us for the January and August terms, and that list is clipped in small bundles and put in a box, and there has been no discrimination of colored people in the selection of the Grand Jury from the list as at those terms. A child under ten then draws the names out of the box until the Jury is selected" (R. pp. 23, 24).

Therefore, it appears from the defendants' evidence that the male population of Lenoir between the ages of 21 and 49, inclusive, is 61 per cent White and 39 per cent Negroes (R. p. 21). The Supreme Court of North Carolina in upholding the conviction of the defendants had this to say in regards to the question of exclusion:

"Defendants' motion to quash the indictment is overruled for the simple reason they have failed to carry the burden of showing facts which would permit a reasonable inference of intentional or purposeful racial discrimination against Negroes in the drawing and selecting of the Grand Jury

which return the indictment against them in the instant case" (R. p. 62).

The defendants in this case have shown all that it was within their power to show. From the record and from the testimony of the Clerk of the Superior Court of Lenoir County, it is apparent that the defendants were indicted by a Grand Jury on which there were no Negroes. From the testimony of the Clerk it appears that during the last 24 years only one Negro has served upon the Grand Jury of Lenoir County (R. pp. 22, 23 and 24). Add to this the testimony of Milton Guy Williams, Tax Supervisor, from which one can determine that Negroes make up about 39% of the population of Lenoir County (R. pp. 21 and 22). With these facts in mind it is obvious that the names of Negroes are not being drawn for service upon the Grand Jury, either they are not reaching the jury panel, or they are not being placed in the box out of which the Grand Jury is drawn, or they are purposefully and by design not being accepted for Grand Jury service, whatever, the case the figures protracted over the period of time involved is a sufficient showing to make out a *prima facie* case of racial discrimination, in the composition of Grand Juries in Lenoir County including the one which indicted these defendants: *Eubanks* v. *Louisiana*, 356 U.S. 584; 78 S. Ct. 970; 2 L ed. 991. *Reece* v. *Georgia*, 350 U.S. 85; 76 S. Ct. 167, 100 L ed. 77. *Patton* v. *Mississippi*, 332 U.S. 563; 68 S. Ct. 184; 92 L ed. 76; 1 ALR 2d 1286. *Hill* v. *Texas*, 316 U.S. 400; 62 S. Ct. 1159; 86 L ed. 1559. *Smith* v. *Texas*, 311 U.S. 128; 61 S. Ct. 164; 85 L ed. 84. *Norris* v. *Alabama*, 294 U.S. 587; 55 S. Ct. 579; 79 L ed. 1074. *Hale* v. *Kentucky*, 303 U.S. 613; 58 S. Ct. 753; 82 L ed. 1050. *Hernandez* v. *Texas*, 347 U.S. 345; 74 S. Ct. 667; 98 L ed. 866.

In the trial of this action the defendants relied upon the case of *Hernandez* v. *Texas*, *supra*. In the *Hernandez* case

the defendant showed that Mexicans constituted a substantial portion of the population of the county in which he was tried and that Mexicans were a distinct and separate class of people, and that no Mexican had served on the jury of that county the past 25 years. According to the decision in *Hernandez*, once the petitioner had shown these facts he had met the burden of proof imposed upon him and the burden then shifted to the State to rebut the *prima facie* showing of discrimination in the selection of the jurors. In the case before this court, the petitioners, Arnold and Dixon, have shown that Negroes constitute a substantial portion of the population of Lenoir County and that Negroes also constitute a separate class of people in Lenoir County, and that only one Negro in 24 years has served upon the Grand Jury in Lenoir County, therefore, under the rule of the *Hernandez* case the indictment against these petitioners is fatally defective and must not stand as the State has not shown any evidence to rebut the *prima facie* showing of racial discrimination.

Having made out a *prima facie* case, the burden no longer remained with the defendants, but shifted to the State. The burden upon the State after a showing that Negroes constituted a substantial portion of the population of Lenoir County and that during the preceding 24 years only one Negro had served upon the Grand Jury was to show that the exclusion of Negroes from service upon the Grand Jury was for some reason other than racial discrimination and the State does not meet this burden by extracting from officials of the county a statement to the effect that there has been no discrimination in the selection of the Grand Jury of Lenoir County. *Hernandez* v. *Texas, supra; Patton* v. *Mississippi, supra; Hill* v. *Texas, supra; Norris* v. *Alabama, supra.*

II. That the Court Below Erred in Sustaining the Trial Court Refusal to Grant the Defendants a Continuance for the Reason That They Had Not Been Given a Mental Examination as Required by an Order Signed by Albert W. Cowper, Judge.

It is admitted by these defendants that the provisions of Sec. 122-91 of the General Statutes of North Carolina, that they were not as a matter of law entitled to receive from the State of North Carolina a mental examination in order to determine whether or not they were competent to stand trial. However, the defendants do contend that once the Resident Judge had in his discretion signed an order requiring such an examination, that then the examination as required in the order became a matter of right, and when the State put the defendants on trial for their lives without first giving them a mental examination, which fulfilled the requirements of that order, they were deprived of due process under both the Federal and the State Constitutions. The futility of the trial judge offering the petitioners an opportunity to be examined by any psychiatrist or psychologist of their choosing during the progress of the trial is apparent. The petitioners in this case were not able to employ counsel and counsel had to be appointed to represent them because of their poverty.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of North Carolina, upholding the conviction of the defendants by the trial court should be reversed by the Court and this matter referred to the Supreme Court for additional action.

Respectfully submitted,

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